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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

JULIO GARRIDO,

Plaintiff,

vs.

BEALL CORPORATION, dba BEALL  
TRAILERS OF OREGON, INC.,

Defendant.

Civil No. 10-845-AA  
OPINION AND ORDER

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AIKEN, Chief Judge:

Plaintiff's Complaint alleges an employment discrimination action against his former employer, defendant Beall Corporation. Plaintiff's claims include a violation of worker's compensation discrimination laws, Family Medical Leave Act violations (state and federal), Americans with Disabilities Act (ADA), Oregon Rehabilitation Act, Age Discrimination in Employment Act (ADEA), and wrongful termination. Defendant filed a motion to dismiss against plaintiff's Complaint. Defendant's motion is denied.

#### STANDARDS

Under Fed. R. Civ. P. 12(b)(6), once a claim has been stated adequately, it may be supported by "showing any set of facts consistent with the allegations in the complaint." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). See also Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984). The complaint must allege, however, "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. For the purpose of the motion to dismiss, the complaint is liberally construed in favor of the plaintiffs, and its allegations are taken as true. Rosen v. Walters, 719 F.2d 1422, 1424 (9th Cir. 1983).

#### DISCUSSION

In support of its motion to dismiss, defendant submitted the affidavit of James Olson, the Vice President/General Manager of

Beall Trailers. In general, a district court "may not consider any material beyond the pleadings" when ruling on a motion to dismiss. Cooper v. Pickett, 137 F.3d 616, 622 (9th Cir. 1998) (quoting Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994)). However, a district court may consider documents specifically referenced in the complaint, assuming the documents' authenticity is not contested. Id. Accordingly, I consider only the exhibits to Olson's affidavit that plaintiff specifically referenced in his complaint. Those exhibits include the following: exhibit 1, the collective bargaining agreement; exhibit 2, the termination letter from Olson to plaintiff; exhibit 3, plaintiff's grievance form; and exhibit 4, the letter from Olson to plaintiff regarding his grievance. The remainder of the exhibits are not specifically referenced in plaintiff's Complaint and, therefore, will not be considered.

1. FMLA (Second Claim) & OFLA (Third Claim)

Defendant moves to dismiss plaintiff's Family Medical Leave Act (FMLA) claim (claim two) and Oregon Family Leave Act (OFLA) claim (claim three).

Defendant contends that plaintiff's FMLA and OFLA claims must fail because he was properly laid off under his collective bargaining agreement (CBA). In support of its argument, defendant relies on Olson's affidavit, citing the union's determination that plaintiff's layoff did not violate the CBA.

However, the union's determination was never specifically referenced in plaintiff's Complaint and therefore outside the scope of the pleadings.

Moreover, plaintiff's allegations are sufficient to support both a FMLA and an OFLA claim. Specifically, plaintiff alleged that he took FMLA/OFLA leave from defendant, his employer, and that defendant failed to return plaintiff to employment when his leave ended. Complaint, p. 6. Consequently, dismissing plaintiff's FMLA and OFLA claims is inappropriate at this time.

2. ADA (Fourth Claim) & Oregon Rehabilitation Act (Fifth Claim)

Defendant also moves to dismiss plaintiff's ADA claim (claim four) and Oregon Rehabilitation Act claim (claim five). Defendant does not argue that plaintiff's allegations are insufficient, but argues instead that the CBA precludes plaintiff's claims. In support, defendant relies on U.S. Airways v. Barnett, 535 U.S. 391 (2002). However, Barnett involved a motion for summary judgment, not a motion to dismiss and is therefore distinguishable. See id. Thus, defendant's assertion that plaintiff was laid off pursuant to the CBA is insufficient to grant a motion to dismiss.

3. ADEA (Sixth Claim)

Defendant also moves to dismiss plaintiff's ADEA claim (claim six). Similar to defendant's argument regarding plaintiff's ADA claim, defendant does not contend plaintiff's

allegations are insufficient. Instead, defendant argues that the court should look beyond plaintiff's Complaint and consider other layoffs that occurred when plaintiff was laid off. Defendant relies on Olson's affidavit and points to twenty-four employees younger than plaintiff who were laid off to support its argument. However, this evidence comes from an exhibit that plaintiff did not specifically reference in his Complaint, and therefore, I will not consider these other employees. Additionally, defendant's argument ignores plaintiff's allegation that his name was included with other "older guys" on a list of workers to layoff. See Pl's. Complaint at ¶ 19. Based on this contradiction, it appears defendant is asking this court to determine whether there is currently sufficient evidence to find for plaintiff. Such a weighing of evidence while appropriate for a motion for summary judgment, is wholly inappropriate for a motion to dismiss. Thus, defendant's motion is denied.

#### 4. Workers' Compensation Discrimination (First Claim)

Defendant next moves to dismiss plaintiff's workers' compensation claim (claim one), arguing that plaintiff's filing for workers' compensation "had absolutely no correlation with layoff decisions." Def.'s Mem. in Suppt. of Def. Beall Corp's. Mot. to Dismiss, p. 8. Defendant further argues that no correlation can exist because defendant has retained multiple employees who have recently filed for workers' compensation

discrimination. Again, defendant's argument relies on facts outside of the pleadings, which will not be considered.

Plaintiff sufficiently states a claim for workers' compensation discrimination by alleging that defendant discriminated against him for utilizing the workers' compensation system. Complaint, p. 7. Accordingly, defendant's motion is denied.

5. Wrongful Termination (Seventh Claim)

Defendant moves to dismiss plaintiff's wrongful termination claim (claim seven). Defendant argues that dismissal is appropriate for two independent reasons. First, defendant alleges it never discharged plaintiff and that there was nothing wrongful about plaintiff's layoff. Second, defendant maintains that even if plaintiff was wrongfully terminated, an adequate statutory remedy exists.

Plaintiff adequately states a claim for wrongful termination by alleging: 1) defendant terminated plaintiff's employment via his termination letter and 2) that defendant terminated plaintiff because he pursued FMLA/OFLA leave or workers' compensation, or because of his age or disability. Defendant argues that the termination cannot be wrongful because it was pursuant to the CBA, and that the National Labor Relations Board ("NLRB") agreed. However, as stated repeatedly throughout this order, I cannot consider evidence outside the pleadings or specifically referenced in them. Because the NLRB's decision is not

specifically referenced in the pleadings, I will not consider it.

Further, defendant has not met its burden of proving that an adequate statutory remedy exists. Rather than citing case law declaring that plaintiff's other claims provide an adequate remedy, defendant makes a conclusory statement that the statutes referenced by plaintiff provide adequate remedy. In other words, defendant appears to argue that the mere existence of a statutory remedy makes it adequate. Defendant cites no authority for this assertion, while plaintiff provides case law demonstrating that FMLA, OFLA, and ADA claims do not automatically provide an adequate statutory remedy. Oelke v. Costco Wholesale Corp., 2005 U.S. Dist. LEXIS 42165 (D. Or. Apr. 26, 2005). Accordingly, defendant's motion is denied.

#### 6. Inconsistent Claims

Finally, defendant contends that plaintiff's Complaint fails because he alleges "inconsistent and irreconcilable claims." Def.'s Reply Mem., p. 5. However, the Federal Rules of Civil Procedure explicitly allow a party to make inconsistent claims. Fed. Rules of Civ. Pro. 8(d)(3). Further, none of the cases defendant cites in support involve a motion to dismiss. Gross v. FBL Financial Servs., Inc., 129 S. Ct. 2343 (2009) (involving challenge to jury instructions); Serwatka v. Rockwell Automation, Inc., 591 F.3d 957 (same); Fairley v. Andrews, 578 F.3d 518 (7th Cir. 2009) (involving motion for summary judgment). Accordingly,

the fact that plaintiff may have pled inconsistent claims does not warrant dismissal.

CONCLUSION

Defendant's motion to dismiss (doc. 3) is DENIED.  
IT IS SO ORDERED.

Dated this 6 day of December 2010.

A handwritten signature in cursive script, appearing to read "Ann Aiken", is written above a horizontal line.

Ann Aiken  
United States District Judge